

## The Inevitable Globalization of Constitutional Law

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### I. Introduction

Lorraine Weinrib writes of a post-war paradigm of domestic constitutional law, adopted by nations around the world.<sup>2</sup> That paradigm combines institutional and doctrinal features. Institutionally the post-war paradigm insists on the importance of constitutional review of legislation by an independent court; that is, it rejects parliamentary supremacy in its strongest forms. I would add a reasonably high degree of centralization of regulatory authority in national governments,<sup>3</sup> even in nominally federal systems.<sup>4</sup> Doctrinally the post-war paradigm implements national

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<sup>2</sup> “The Post-War Paradigm and American Exceptionalism,” in *THE MIGRATION OF CONSTITUTIONAL IDEAS* (Sujit Choudhry ed. 2006).

<sup>3</sup> Notably, as a matter of stated international law, the fact that a nation may be unable to comply with international obligations it has undertaken because of its internal federal structure does not in general relieve the nation of its duty to comply and its vulnerability to sanctions for non-compliance.

<sup>4</sup> The combination of regulatory authority flowing upwards from nations to supranational bodies such as the European Union and the devolution of regulatory authority to subnational units complicates this suggestion. Speaking broadly, I would assert that the post-war paradigm with respect to regulatory authority is that no governing entity can depart much from some standard set at a reasonably high level: So, for example, both subnational units exercising devolved power and national ones have some, in my view, modest “margin of appreciation” with respect to their regulatory choices, but it is the modesty of the margin rather than its existence that is the important feature of the post-war paradigm. I believe that there is also a trend toward concentration of power in the executive branch in separation-of-powers systems, but that the reasons for this trend

commitments to the protection of basic human rights through proportionality tests licensed by explicit (though sometimes implicit) limitations clauses. In addition, the paradigm includes a separate commitment to “rule of law” principles regarding procedural regularity, legal transparency, and modulated legal change so as to avoid defeating reasonable expectations of legal stability.

Set against the idea of a post-war paradigm of constitutional law is the idea of domestic constitutional exceptionalism. Australia and the United States appear to be the nations with the strongest commitment to exceptionalism. Australia lacks a judicially enforceable set of human rights, for example, and the United States appears to resist references to non-U.S. constitutional law in constitutional adjudication for reasons rooted in exceptionalist ideas. The sources of these commitments to exceptionalism differ somewhat. Australian exceptionalism seems rooted in a deep national commitment to legislative supremacy as the best expression of democratic self-governance.<sup>5</sup> United States exceptionalism seems to arise from a related concern: Not that legislative supremacy is the best expression of democratic self-governance, but that there is an ineradicable tension between the post-war paradigm’s commitment to reasonably intrusive judicial supervision of legislation and even somewhat modest versions of the view that legislatures are the preferred locations for democratic choice.<sup>6</sup>

To speak of the globalization of domestic constitutional law is to suggest that these and other traditions of exceptionalism are likely to weaken over time.<sup>7</sup> The suggestion is different from – weaker in some ways, stronger in others – the claim that nations will gradually but inevitably abandon authoritarianism for rule-of-law constitutionalism. It is weaker than that claim because the globalization processes I identify are

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are not closely related to the causes of the globalization of domestic constitutional law I discuss here

<sup>5</sup> For an argument that Australian exceptionalism is weakening (or perhaps only that it should weaken), see Michael Kirby, *Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges*, 9 MELBOURNE J. INT’L L. 171 (2008).

<sup>6</sup> For reasons sketched below, text accompanying notes --- *infra*, I do not think that American constitutional exceptionalism rests on an accurate judgment that the values constitutionalized in the United States differ significantly, either individually or as a package, from those constitutionalized in other modern social welfare states.

<sup>7</sup> I am concerned here with *domestic* constitutional law, and do not address the separate question of, and controversy over, whether there is something fairly called a constitution of the international order or a global constitution.

limited to nations – some authoritarian but others already rule-of-law systems – that compete internationally for investment and human capital, with a class of lawyers able to assert some autonomous pressure on the nation’s government.<sup>8</sup> It is stronger than that claim, though, because I use the term “globalization” to suggest convergence among national constitutional systems in their structures and in their protections of fundamental human rights.<sup>9</sup>

I refer to convergence and (sometimes) harmonization, but not to uniformity. The processes I describe may induce nations to converge on the statement of constitutional principles on high or intermediate levels of abstraction or on some quite specific details, and even convergence on the most abstract level can be important and consequential. But so too are differences in detail, which means that globalization does not entail uniformity. Further, although I argue that there are processes that push in the direction of convergence, I make no claims about the magnitude of those processes’ effects, or (putting it another way) about the extent to which those effects will be offset by counter-pressures in particular nations. As a result, I make no claims either about the rate at which the globalization of domestic constitutional law will occur.

My point of reference is the United States, whose constitutional system I know best, and my argument is that the globalization of constitutional law is impelled by “top down” and “bottom up” forces that have reasonably deep roots in the political and economic system in which every nation within the scope of my argument is today located.<sup>10</sup> This Essay examines “top down” processes impelling the globalization of constitutional law in Section II and “bottom up” processes in Section III. Section IV turns to some sources of resistance to that globalization, describing – and to some extent explaining why I discount – these countervailing forces. My argument might be described as one in which nations race with respect to constitutional law, and Section V asks whether

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<sup>8</sup> For example, nations whose income depends on resource extraction may not experience many of the pressures attributable to the preferences of highly skilled workers, few of whom will be permanent residents in such nations. The limited effects of the processes I describe here on authoritarian regimes and resource-extraction nations suggests that the phenomenon I am describing is one of only partial globalization of constitutional law.

<sup>9</sup> In what follows I sometimes speak of a convergence among domestic constitutional systems, but I refer to a single phenomenon of globalization/convergence.

<sup>10</sup> As noted in the text, I am agnostic as to the general content of the rules on which domestic constitutional systems will converge, whether on abstractions, mid-range concepts, or details.

the race is to the top, the bottom, or somewhere else. The Conclusion discusses some implications of the argument for domestic separation of powers law. In sum: Because the globalization of domestic constitutional law is inevitable, notions of separation of powers – or of legislative supremacy qualified by the existence of judicial review – will have to accommodate themselves to that globalization. Although my primary argument here is about the processes impelling globalization, in my conclusion I will sketch some thoughts about how that accommodation might occur.

## II. Top-Down Processes of the Globalization of Constitutional Law

Most scholarship on the globalization of domestic constitutional law focuses on top-down processes. Probably the most widely known is Anne-Marie Slaughter's work on the development of cross-national networks of constitutional court judges, akin to the cross-national networks she finds throughout the contemporary international system.<sup>11</sup> Judges of the world's constitutional courts now meet regularly in academic and other conferences, and some serve with others on various transnational bodies. Slaughter suggests that personal interactions at least conduce to and probably encourage judges to consider and occasionally adopt solutions to problems they come to see as common across constitutional systems.<sup>12</sup> Personal contact will show a judge of a constitutional court in one nation that judges occupying similar positions elsewhere often confront the same kinds of problems the first judge does, that those judges seem to be sensible people and reasonably astute lawyers, and that the first judge could probably do worse than take their solutions seriously as she attempts to solve the problems she faces. For some, judges in other nations will become members of the reference group of people whose judgments about their own work matter. And, apart from these networking connections, as the world's elites become more cosmopolitan – as trends in education and transnational career paths suggest they will – they will be increasingly inclined to view decisions

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<sup>11</sup> The most developed exposition is ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER*, ch. 2 (2004). Slaughter includes among the reasons for the development of a globalized constitutional law the choices individual judges make when they refer to decisions by courts from other nations. This is of course descriptively accurate, but in contrast to her identification of personal contacts, it does not suggest a mechanism leading judges to make such choices.

<sup>12</sup> See *id.* at 96-99. For a substantially more skeptical view of the effects of transnational networks, focusing on NGOs, see ANNELISE RILES, *THE NETWORK INSIDE OUT* (2000).

taken elsewhere as worth considering as they deal with domestic constitutional problems.

As Weinrib's account suggests, convergence can occur narrowly, for example with respect to the general approach constitutional court judges take to government efforts to regulate speech critical of government policy that executive officials believe poses some threat of social disorder. Or it can occur more broadly, as with the formulation of proportionality tests in numerous doctrinal domains. But, in this phase of the analysis, what propels convergence is personal contact among sensible lawyers seeking to perform what they come to understand to be similar jobs.

Transnational NGOs who take constitutional matters – typically but not exclusively, a subset of constitutional law dealing with fundamental human rights – as their focus of concern provide another institutional location pushing toward the globalization of constitutional law.<sup>13</sup> These NGOs intervene in domestic constitutional disputes in several (or many) nations, and put forward a universalist understanding of human rights. Sometimes the interventions take the form of “constitutional advice giving,” in which they offer constitutional structures and rights as models worth adopting.<sup>14</sup> Sometimes this may mean no more than informing domestic courts of the approaches taken to the problem at hand in other nations; sometimes, I think more often, the aim is to influence the domestic courts to adopt the NGOs' preferred solutions by providing good reasons (as the NGOs see things) for those solutions. To the extent that transnational NGOs tend to present a more-or-less unified perspective in favor of human rights as currently understood, their regular appearance in domestic courts will provide a consistent force in one direction, at least until (as might happen) some countervailing pressure is consistently asserted by some other institutions.<sup>15</sup>

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<sup>13</sup> These NGOs might be transnational in structure, such as Amnesty International, or might be permanent “alliances” among domestically organized groups.

<sup>14</sup> For my views on this practice, see Mark Tushnet, *Some Skepticism About Normative Constitutional Advice*, 49 WILLIAM & MARY L. REV. 1473 (2008).

<sup>15</sup> These countervailing pressures might come from counter-NGOs, if they develop (anti-terrorism NGOs, for example). Particularly if such NGOs are domestically oriented, they might emphasize the peculiar national concerns implicated in the problem presented, and stress that transnational NGOs cannot fully appreciate those concerns. And, of course, domestic legislatures and executive authorities will always be present, perhaps supplemented by support from allies on the international scene. My tentative view is that the transnational NGOs have a systematic advantage

Top-down pressure also comes from transnational treaty bodies whose decisions have domestic constitutional implications, sometimes through the force of law and sometimes through more diffuse mechanisms such as effects on reputation. Here the exemplary institution is the European Court of Human Rights. National courts subject to review by these treaty bodies will almost inevitably mirror their jurisprudence, that being the safest way to avoid reversal, embarrassment, and perhaps financial sanctions against the domestic government. Here the mechanism of convergence is straightforward. Perhaps the only point worth making is that this form of globalization can occur with respect to institutional structure as well as human rights. So, for example, the ECHR's decisions on the relation between fundamental fairness and judicial structure<sup>16</sup> appear to have played some role in the creation of the new Supreme Court in the United Kingdom.<sup>17</sup>

Convergence induced by international treaty bodies does raise an important point relevant to the separation of powers. Nations subject themselves to regulation by international treaty bodies through their domestic law-making processes.<sup>18</sup> Accession itself cannot raise interesting separation-of-powers questions. But, as the international treaty bodies begin to make decisions that some claim to have domestic effect, it may sometimes happen that treating those decisions as domestic law will raise troublesome questions of domestic constitutional law.<sup>19</sup> But, the

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along one dimension because they can present and sustain a single view over a reasonably long period, whereas national governments face conflicts from within the nation that make it more difficult for them to do the same. But, of course, national governments will almost certainly have greater resources than transnational NGOs, giving them an advantage along another dimension.

<sup>16</sup> See, e.g., *Procola v. Luxembourg*, 22 ECHR 193 (1995); *McGonnell v United Kingdom*, 30 EHRR 289 (2000).

<sup>17</sup> For a report of the Council of Europe recommending that the United Kingdom consider the creation of a Supreme Court to avoid the combination of functions in the House of Lords, see Council of Europe, doc. 9798, 28 April 2003, "Office of the Lord Chancellor in the constitutional system of the United Kingdom," available at <http://assembly.coe.int/Documents/WorkingDocs/Doc03/edoc9798.htm>.

<sup>18</sup> For present purposes I put aside as unproductive what seem to me largely theoretical questions about whether a nation's constitutional system is monist or dualist with respect to international law.

<sup>19</sup> For discussions of the U.S. constitutional issues, see Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003); David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial*

very fact that the international treaty body – with some semblance of authority – has made a decision will assert some pressure against the arguments premised solely on domestic constitutional law.<sup>20</sup> And, as I have already suggested, when the purely domestic arguments fail and the international body's decision prevails, almost necessarily domestic separation-of-powers law will have accommodated the development. Again, these effects will not always occur,<sup>21</sup> but when they do the effect is always in the direction of globalization and, concomitantly, adjustment of domestic separation-of-powers law.

### III. Bottom-Up Processes of the Globalization of Constitutional Law

David Law connects globalization and constitutional rights by means of market processes.<sup>22</sup> He argues that economic globalization includes competition among nations for investment and human capital. Nations compete by offering investors and those with high levels of human capital – the well-educated and trained – attractive packages of benefits. An important component of those packages, Law argues, is constitutional protection.

The argument as to investors is straight-forward.<sup>23</sup> When considering where to place their capital, investors will consider the returns

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*Authority*, 55 STAN. L. REV. 1697 (2003); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004).

<sup>20</sup> Here I think it significant that the weight of scholarly authority in the United States on the separation-of-powers questions these arrangements raise supports the arrangements, as does the weight of the (very little) judicial authority.

<sup>21</sup> See, for example, *Medellin v. Texas*, 128 S. Ct. ---- (2008).

<sup>22</sup> David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277 (2008). In what follows I sketch the outlines of Law's argument, which in its details contains a number of important qualifications that go largely to the pace of globalization of constitutional law.

<sup>23</sup> A note on the harmonization of private law seems appropriate here. The pressures for private-law harmonization are, I believe, substantially greater than those for the globalization of constitutional law. Differences among substantive legal rules applicable to private transactions are costly in direct and obvious ways. This gives lawyers and their clients a reasonably strong interest in reducing such differences, which can be accomplished through harmonization. The costs of differences in constitutional law are, in contrast, less obvious and, perhaps more important, more difficult to reduce by ordinary political means.

they are likely to receive on the investment. Consider an investor choosing between one nation that offers a relatively high rate of return, but does not guarantee that the investor will actually be able to realize the returns because the nation's constitution authorizes the government to expropriate investments and returns at will, and a nation offering a slightly lower rate of return. As Law puts it, investors "seek . . . to maximize their risk-adjusted returns."<sup>24</sup>

Depending on the size of the gap and the likelihood of expropriation, the second nation may be able to attract the investment by coupling the lower rate of return with an assurance that the returns will actually be realized. And it can do that by providing constitutional protections for investment, to be enforced by an independent court (that is, a court not under the control of the executive government). To meet that competition, the first nation will adopt similar constitutional protections. So, through a race to the top, globalization induces one nation after another to adopt constitutional protections for property rights, enforced by independent courts.<sup>25</sup>

But more than property rights are involved. Investors value political stability generally, and there is some reason to think that a government can reassure investors worried about stability by providing some threshold level of civil rights and civil liberties to the nation's residents. That level, to be sure, may not be terribly high. Further, some authoritarian rules may have time horizons that are short enough – basically, to the point where they expect to leave the country with wealth they have accumulated – that make them indifferent to concerns about stability in the longer term. Even so, stability concerns are likely to have some effect, however modest, in giving ruling elites incentives to provide some modest rights guarantees.

The argument with respect to human capital is different because it depends on assumptions, almost certainly correct, about the preferences of well-educated people, that is, those with relatively high levels of human capital.<sup>26</sup> Law assumes that such people prefer reasonably high levels of individual freedom, including freedom to live a private life pretty much as

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<sup>24</sup> Law, *supra* note ---, at 1311.

<sup>25</sup> Law emphasizes that constitutional rules that maximize risk-adjusted returns will almost inevitably authorize significant amounts of government economic regulation in the service of economic and political stability. *Id.* at 1311-12.

<sup>26</sup> As Law puts it, "*To the extent that workers with valuable skills are mobile and desire similar rights and freedoms*, competition for such workers has the potential to generate a 'race to the top' ...." *Id.* at 1323 (emphasis added).

one will, freedom of expression, and freedom of religion.<sup>27</sup> It is important to emphasize that this is an assumption about the preferences of and values held by those with these levels of human capital: Not only do they prefer these liberties for themselves, but they also prefer that others in the society with which they identify have the same liberties.<sup>28</sup> If that is correct, nations will compete to offer these people constitutional protections of personal freedom, for the same reasons that they will compete to offer property-rights protections: In a globalized economy, people with high levels of human capital are just about as mobile as investment capital, and will locate themselves in nations that provide them with what they want by way of freedom.

Law's arguments rest on the proposition that real and human capital is mobile. There is another source of bottom-up pressure to globalize constitutional law, involving not actual physical mobility of investments and people but "mobility" in the provision of services, specifically legal services. Globalization means that lawyers in one country will routinely interact with other nations' legal systems. So, for example, family lawyers in the United States will inevitably deal with the Hague Convention on the Civil Aspects of Child Abduction, and in doing so will have to come to some understanding of whether or how another nation's procedures provide fundamental guarantees of procedural justice.<sup>29</sup> Lawyers working on transnational contracts will have to understand where in some other nation's constitutional system relevant regulatory authority resides – in the nation or in some subnational unit, for example, or in which administrative body. To do so the lawyer will have to understand the nation's constitutional system.

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<sup>27</sup> See *id.* at 1335-36 (citing evidence to support the proposition that "elite workers are . . . characterized by a taste for individual freedom ...."). This taste, I note, might sometimes be satisfied by constitutional protection afforded to common values realized differentially, at least within some range of reasonableness. To the extent that Weber's classic thesis about the connection between certain religious beliefs and personal investments in acquiring human capital is correct, there might be an intrinsic connection between having a high level of human capital and (some) religious beliefs supporting religious freedom.

<sup>28</sup> The idea here is similar to that dealt with in the literature on the proposition that "richer is safer," that richer people prefer higher levels of safety than poor people do because their preferences change as they become richer and not simply because they can afford to purchase more safety with their greater incomes.

<sup>29</sup> I use the example of family lawyers and the Hague Convention because in the United States such lawyers tend to be sole practitioners or practitioners in small law firms. The example thus demonstrates how deeply globalization penetrates into the legal profession.

These examples, involving both constitutional rights and constitutional structure, show that domestic lawyers will need to learn about other nations' constitutional systems. Doing so is costly. The cost of learning will be lower if the other nation's constitutional system is the same as, or nearly the same as, the domestic lawyer's.<sup>30</sup> To overstate the point: Having learned domestic constitutional law, the domestic lawyer will *already* know at least something about the other nation's.<sup>31</sup>

This suggests that domestic lawyers with transnational business – which is to say, a great many domestic lawyers – will prefer some degree of convergence of constitutional systems. A domestic lawyer will face lower costs in transacting with lawyers in nations with constitutional systems similar to the one the domestic lawyer already knows than in transacting with lawyers in nations with dramatically different constitutional systems. The difficulty, though, is that this demand will arise at both ends of transactions, and it will be less costly for the lawyers in each nation if the *other* nation's law moves in their direction. This is a classic coordination game, with two equilibria acceptable to the players but with neither having any obvious advantages. To some extent it can be solved, or at least its impact lessened, because of ordinary learning processes: With any luck, after dealing with each other, the lawyers in one nation will come to think that the other nation offers a better solution to specific constitutional problems, and will urge their law-makers to adopt that solution. The same network processes that lead constitutional court judges to learn from each other can lead lawyers to do the same. The judges have the power to change the law, of course, whereas the lawyers can only place pressure on their nations' law-makers to change the law.

Perhaps more important, markets may intervene here as well. Consider lawyers in two nations competing to obtain business in another nation. Their transacting partners will prefer to deal with lawyers from the

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<sup>30</sup> My argument here is related to the argument prevalent in the literature on harmonization of private law that harmonization or convergence makes coordination (and contracting) easier. It differs from that argument because the domestic constitutional rules on which national systems converge do not provide a solution to a coordination problem available to both parties at low cost but instead reduce the cost of determining whether some arrangement is constitutionally permissible or prohibited in one or the other constitutional system.

<sup>31</sup> Changes in legal education could supplement convergence. As students lawyers would learn the constitutional law of other nations, thereby reducing the costs of practicing law transnationally. Legal education occurs before the lawyer knows which nations' constitutional law she should know, which suggests that *some* degree of convergence will still be useful to practicing lawyers.

nation whose laws (including constitutional law) are similar to their own: The costs to the transacting partners are lower, after all. That will induce the lawyers in the nation who lose business to seek changes in their own nation's law. Competing for business in a globalized economy, domestic lawyers will "demand" (in the economic sense) that their own constitutional system converge with systems elsewhere.<sup>32</sup>

That demand exists does not mean that supply will be forthcoming. Law "producers" have to see the increased demand and conclude that somehow they themselves will benefit from convergence.<sup>33</sup> Here bottom-up pressure has to be satisfied through top-down processes. To this point I have emphasized structures and pressures, but to complete the argument, it seems to me necessary to give ideology some direct role – rule-of-law considerations for the judges in transnational networks, substantive commitments to human rights for the highly skilled. By way of introducing further qualifications, I point out there is nothing inevitable about the direction in which these ideological considerations will push, and so nothing truly inevitable about the globalization of domestic constitutional law – only some seemingly strong structural pressures in that direction.

#### IV. Qualifications: Counterpressures on the Supply Side

The law- and lawyer-driven accounts of bottom-up globalization identify tendencies, of course, and certainly identifying them tells us nothing about the pace of globalization of domestic constitutional law. In addition, each is subject to possibly important qualifications.

Perhaps the most important qualification is that the bottom-up accounts treat market pressures toward globalization as exogenous to the domestic and international legal systems, yet markets are themselves constructed by legal rules. Were there a different set of legal rules in place – for example, rules that treated contracts between a prosperous party and a significantly less prosperous one as voidable as coercive – there would be different pressures on national law-makers to develop *other* rules, and not necessarily the constitutional protections Law argues are produced by the race to the top.<sup>34</sup> As an analytic matter, this seems clearly correct, but somehow misdirected in the world as it now is. Law

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<sup>32</sup> I suspect that some mechanism like this might explain what appear to be mere preferences for convergence in Slaughter's account.

<sup>33</sup> The profit motive induces producers of goods and services to respond to increased demand, but there is no closely analogous motive for law-makers.

<sup>34</sup> This combines a standard legal realist critique of contract doctrine with equally standard public choice analysis.

implicitly makes reasonable assumptions about the actual content of domestic legal regimes, and at the very least his arguments have a resonance that the realist critical argument lacks.<sup>35</sup> Put another way: Law assumes, I believe correctly, that some version of the so-called Washington Consensus is likely to remain important in structuring domestic legal rules in nations interested in attracting investment and high-skilled human capital.

Earlier I suggested some additional qualifications. Authoritarian regimes are likely to resist rather strongly pressures to “level up” the protections they give civil rights and civil liberties, though not property rights. And a nation whose wealth rests on resource extraction may have little need to attract large enough numbers of people with high levels of human capital for such people to place pressure on the nation’s government. These qualifications have a common structure. Political elites are willing to forgo the economic benefits of inflows of investment or high-level human capital,<sup>36</sup> so as to ensure that their political power is not diminished by constitutionalizing civil rights and civil liberties. Put another way, elite preferences can counter pressures toward the globalization of domestic constitutional law.<sup>37</sup>

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<sup>35</sup> A more limited point about the endogeneity of law bears on the lawyer-related bottom-up argument. Domestic lawyers have an interest in monopolizing access to domestic law through the usual exclusionary practices. Yet, it seems to me, exclusion of non-domestic lawyers from domestic legal practice is not related to (or only quite indirectly related to) the bottom-up pressures domestic lawyers may place on their law-makers to bring domestic constitutional law into rough alignment with constitutional law elsewhere. And, in any event (and for whatever reason), the domestic lawyers’ monopoly over legal practice seems to have weakened substantially in the era of globalization. Each member of the European Union must allow lawyers licensed in other member states to practice locally. See Case 2/74 *Reyners v Belgian State* [1974] ERC 631; Case C-55/94 *Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano*, [1995] ECR I-4165. And, even in the United States, many jurisdictions allow non-U.S. lawyers to practice relatively freely.

<sup>36</sup> Inflows of high-level human capital may be unnecessary in both cases – for resource-extraction nations because resource extraction can take place without much high-level human capital, and in large authoritarian nations because such capital can be developed internally rather than imported.

<sup>37</sup> These elite preferences can take other forms. They may prefer to preserve domestic sovereignty rather than elite power. Or elites may believe that the costs of guaranteeing human rights are too great given the nation’s resources, especially if the package of human rights includes some degree of protection for social and economic rights. For a

Consider next the argument that competition for investment capital will induce nations to provide reasonably high levels of protection for investment by means of constitutional doctrines limiting expropriation and regulatory interventions that substantially reduce that capital's value. Tamir Moustafa's account of judicial independence in Egypt is quite suggestive here,<sup>38</sup> and seems likely to have general implications. According to Moustafa, Egypt's authoritarian government came to understand that its socialist and nationalist commitments obstructed inflows of capital, because investors worried that their investments were always at risk of expropriation. The government responded to those concerns by creating an independent constitutional court authorized to enforce constitutional guarantees, including an anti-expropriation guarantee. The court then exercised its independence to weaken the government's authoritarian control over elections a bit, thereby leading the government to reconsider its commitment to judicial independence. Yet, doing so across-the-board would raise once again foreign investors' concerns about expropriation.

On the level of institutional design, the solution for an authoritarian government seems obvious: Create an independent court with jurisdiction restricted to the matters of concern to foreign investors, and rigorously honor that court's decisions even when they are at odds with the government's immediate policy preferences.<sup>39</sup> The effect would be to create a bifurcated system of constitutional protections, in which rights of domestic subjects received relatively low levels of protection. Law suggests that such a solution might be unstable, perhaps because the existence of parallel regimes of protection would be an ever-present reminder of the authoritarian government's ability to set the level of protection at whatever point it found politically advantageous at the moment, and such a reminder would undercut the anti-expropriation commitment the government seeks to make.<sup>40</sup> If Law is correct, the

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discussion of resistance by local lawyers to the lawyer-driven "bottom up" pressure, see text accompanying notes --- *infra*.

<sup>38</sup> TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT* (2007).

<sup>39</sup> I suspect that this solution may sometimes be unavailable because of path-dependence: Were Egypt to shut down its existing constitutional court and create a new court with narrower jurisdiction, the message to foreign investors might be merely that the government retains complete control over outcomes. Creating a court with restricted jurisdiction from the outset would not send such a message nearly as overtly.

<sup>40</sup> I take this suggestion from a portion of Law's article dealing with competition for human capital, not investment, but it seems to be applicable in both contexts. See Law, *supra* note ---, at 1342 ("A sovereign commitment to respect certain rights can be rendered credible

globalization of constitutional law might occur even in somewhat authoritarian nations.

A similar problem, and a related response, might arise in connection with the argument for globalization of constitutional law based on human capital. Even if nations need to attract and retain residents with specialized training so as to compete effectively in global markets, they could provide bifurcated protections – high levels for people with good human capital, low levels for those with only basic human capital assets.<sup>41</sup> Again, this solution might be unstable because of the message of vulnerability it sends to those with good human capital. And, probably more important, people with high levels of education and training tend to support human rights as such, that is, for everyone and not just for themselves.<sup>42</sup> A bifurcated system of rights-protection would then be insufficient to attract and retain such people.<sup>43</sup>

Government resistance to globalization of domestic constitutional law is a thread common to these processes. Local values, of a sort captured in some conceptualizations of domestic legal exceptionalism, counter the pressures toward globalization. So, for example, while there might be widespread agreement on eliminating the possibility of outright expropriation of foreign investments, there may well be a wide range of variation in the extent to which regulatory impositions will be regarded as the equivalent of expropriation. Some regulatory impositions might be regarded as regulatory takings in one nation, and not in another, simply because the nations differ with respect to the value they place on the goal sought through the regulation.

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by the existence of constraining institutional arrangements.... By definition, however, an authoritarian regime lacks such restraints on its own power. The credibility of an institutional arrangements that a dictator might devise in order to implement a two-tiered system of rights protection would, in all likelihood, be backed by little more than the dictator's interest in developing and maintaining a reputation for the favorable treatment of skilled workers.”).

<sup>41</sup> This is especially true because unskilled workers are likely to be less mobile than skilled ones.

<sup>42</sup> See note --- *supra*.

<sup>43</sup> I should note that if a nation can manage to segregate highly skilled workers in their own enclaves (a segregation that might be geographical or cognitive), the bifurcated system of constitutional protection for the rights of such workers and no protections for other workers might be reasonably stable – although I wonder how effective such segregation can be over the long run.

Resistance of this sort might be accommodated by adjusting transnational norms, through doctrines in the “margin of appreciation” family, without eliminating entirely the pressures toward convergence.<sup>44</sup> More important, though, may be the difficulty national governments will have in sustaining resistance. On many issues that might be arise in the globalization of domestic constitutional law, national governments may find themselves internally divided, needing to satisfy some domestic constituencies that favor the convergence on a specific issue even if they are indifferent to convergence in other issue-areas. Overstating a bit: National governments will face constant pressure toward globalization of domestic constitutional law, and will be able to resist that pressure only intermittently.

One might think that there might be a somewhat different conflict between protection of property rights, induced by competition in the market for investment capital, and one set of human rights widely recognized in contemporary constitutions – protection for so-called second-generation social and economic rights. The reason for the conflict is basically cost: Ensuring second-generation rights requires state expenditures financed out of taxes (today’s or tomorrow’s), but the prospect of paying high taxes might adversely affect a decision to invest in one rather than another nation. As with the other qualifications I have mentioned, here too there is an offsetting influence, albeit one falling within the “top-down” category: International financial institutions such as the World Bank and the International Monetary Fund have increasingly come to the view that investments in human capital – particularly the provision of education and medical care – ultimately repay themselves out of the increased productivity to which they contribute.<sup>45</sup> These top-down pressures to protect some second-generation rights might offset the bottom-up pressures against doing so.<sup>46</sup> I suspect that the globalization of

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<sup>44</sup> This is particularly so if the theory of the margin of appreciation contemplates its gradual reduction over time, as the official theory of the European human rights regime has it.

<sup>45</sup> See, e.g., Press Release no. 2008/259/DEC, “Progress Toward Nutrition, Health, Education, and other Development Goals off Track,” April 8, 2008 (available at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21717783~pagePK:64257043~piPK:437376~theSitePK:4607,00.html>) (quoting World Bank president Robert Zoellick: “As the report shows, reducing malnutrition has a ‘multiplier’ effect, contributing to success in other MDGs including maternal health, infant mortality, and education.”).

<sup>46</sup> For a further account of “top-down” pressures, see Law, *supra* note ---, at 1318-19 (describing World Bank, U.S. government, and European Union programs that encourage aid recipients to protect human rights).

domestic constitutional law will lead to convergence not towards classical liberalism, but to some sort of social democratic liberalism.<sup>47</sup>

The lawyer-driven account of bottom-up globalization faces its own challenges, and can offer its own responses. One challenge, again, looks to local elites, here local lawyers who can offer themselves as specialists in domestic constitutional law to the lawyers outside the nation who are trying to arrange deals. My sense is that such lawyers play an important role in contemporary transnational transactions. Lawyers on the other side of the transaction hire local specialists to assure them that the transaction is consistent with local law, including local constitutional law. Harmonization and convergence take the local constitutional lawyers' distinctive knowledge away from them, and they can be expected to argue against convergence.

These domestic constitutional specialists are not the only interest group involved, though, and may not be the strongest one. First, the non-national lawyers must be confident that the local lawyers they are hiring are truly competent in the fields in which they specialize. Achieving that confidence may be difficult, but some degree of convergence may help. Perhaps more important, the domestic constitutional lawyers are only a subset of all the domestic lawyers involved in transnational transactions. The local transactional lawyers can reduce the cost of transacting by eliminating their partners' need to hire another specialist.<sup>48</sup> It seems to me likely that there will be more, and more influential, local transactional lawyers than local constitutional specialists.

A second lawyer-focused challenge is suggested by an important recent article urging some caution in identifying areas of convergence in constitutional law. Using "judicial balancing" and proportionality doctrine as a case study, Jacco Bomhoff argues that we should be careful about inferring from superficial similarities in doctrinal form convergence at a deeper level.<sup>49</sup> Bomhoff points to the many suggestions that balancing in the United States and proportionality in the post-war paradigm model are quite similar. But, he points out, Europeans "often

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<sup>47</sup> An additional reason for this suspicion is the path-dependent one that many workers with high levels of human capital will come from nations with some degree of social democratic commitments and will (therefore) prefer to see such commitments honored wherever they are located. Yet, countering these preferences would be the interest-based advocacy of more pure forms of neo-liberalism.

<sup>48</sup> And, by doing so, may be able to reap a larger portion of the transactions' benefits for themselves.

<sup>49</sup> Jacco Bomhoff, *Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law*, 31 HASTINGS INT'L & COMP. L. REV. 555 (2008).

omit extended treatment of institutional considerations” in their discussion of proportionality, while U.S. commentators and courts often make such considerations important in their treatment of balancing. And Europeans discuss proportionality by invoking Weberian concerns about formal rationality, a concept entirely absent from U.S. discussions.

To some extent Bomhoff’s argument is, as he acknowledges, a straight-forward application of cautions familiar to scholars of comparative law. Words take on meanings in contexts, and the relevant contexts include the social, economic, and political organization of the world within which the words are used. So, for example, “judicial references to balancing are at heart arguments offered to legitimize the exercise of political power in particular settings.” But, “the legitimizing force of these arguments is inherently dependent on local meanings and understandings.” More generally, balancing formulations combine the universal – the interests to be balanced – with the local, the context within which balancing occurs. Those who notice the similarities in doctrinal formulations may overlook the differences in application because they are insufficiently aware of the local contexts. And, as I indicated at the outset, apparently small differences in detail can have large consequences, both doctrinally and practically.

Another example might be the language of margins of appreciation. That terminology resonates with notions of deference, but it was developed by transnational treaty bodies attempting to explain why they sometimes tolerated diversity with respect to the content and enforcement of treaty rights across national jurisdictions. The rationale for allowing a margin of appreciation is two-fold: an acknowledgement that local conditions may vary widely enough to make variations in the definition and protection of treaty rights sensible on policy grounds (the local decision makers having a better sense of what will work well in their local conditions), and respect for residual national sovereignty.

Consider then the question of whether or the degree to which a domestic constitutional court should defer to decisions made by national executives or legislatures respecting constitutional rights. A constitutional court might observe that, with respect to the constitutional right at issue (freedom of expression with respect to reputation, for example), some transnational treaty body allows a substantial margin of appreciation. The reason for allowing such a margin of appreciation will combine the two reasons for having such a margin in the first place – local variation and national sovereignty. It might be a mistake, though, to give the national law-maker a similar margin of appreciation. To some extent, the national law-maker’s expertise might be analogous to domestic law-makers’ greater knowledge of local conditions, and respect for the democratic warrant for legislative or executive decision-making might similarly be analogous to the sovereignty concerns to some extent. But the “to some extent” qualifications mean that the deference the constitutional court

should give in the purely domestic context might differ from the margin of appreciation the transnational treaty body gives in its own institutional context.

Bomhoff's arguments identify risks, and certainly caution against strong claims about the extent to which the globalization of constitutional law has already occurred. Some of the pressures for the globalization of constitutional law might also work to reduce the imperfect understanding that Bomhoff suggests might occur. Lawyers who discover that seeming agreement on legal meaning masks misunderstanding will do what they can to get meanings to converge further. And each transnational NGO will be ready to offer consistent understandings across nations. The result, I suspect, will be more rapid convergence with respect to high-level abstractions than with respect to mid-level ones, and more rapid convergence with respect to mid-level ones than with respect to many – though perhaps not all – detailed constitutional rules.<sup>50</sup>

I should emphasize that the pressures for globalization that I have identified merely push in that direction. We have no way to identify the rate at which national constitutional systems will respond to those pressures. A reasonable guess would be that convergence with respect to fundamental rights will occur more quickly than convergence with respect to constitutional structures, largely because constitutional structures more strongly condition the way politics is conducted on the national level and so – through those who are involved in domestic politics – produce stronger counterpressures.

One final source of pressure against the globalization of domestic constitutional law deserves mention. “Constitutional” constraints can be enforced externally, by supranational treaty bodies for example, without becoming internalized into domestic constitutional law. Indeed, we might see the globalization of domestic constitutional law as a substitute for the creation of a more general system of external enforcement – a worldwide federation of nations, for example. But, to the extent that external enforcement is available and acceptable,<sup>51</sup> domestic constitutionalization is unnecessary.

## V. Races to the Top and Bottom, and Elsewhere

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<sup>50</sup> For the moment I put to one side the question of whether nominal commitment to high-level abstractions will be accompanied by genuine enforcement of those abstractly described rights. For a discussion, see text accompanying notes --- *infra*.

<sup>51</sup> The British experience with the European Court of Human Rights suggests that external enforcement may not always be acceptable: One impetus for the adoption of the Human Rights Act 1998 was a sense among British political elites that it was embarrassing for the nation to be losing some many cases in the European Court.

The bottom=-up pressures I have described create a “race” among nations on issues of constitutional law. But is it a race to the top, to the bottom, or to somewhere else?

Answering that question is difficult in part because it may be badly posed. What is the “top” with respect to constitutional protections? The United States gives greater constitutional protection to hate speech than do most other liberal democracies, but at some cost to equality and human dignity. Would convergence on rules allowing restrictions on hate speech demonstrate a race in the direction of the bottom? Similarly with respect to constitutional protections of property rights: How much accommodation of local values is consistent with a race in the direction of the top?

A few observations about the race’s direction seem reasonably well-supported. First, there is no reason to think that the “top” with respect to any specific constitutional guarantee is the most robust protection offered anywhere in the world. Constitutional guarantees come with costs, some to other constitutional values, and the nation with the most robust protection of a particular guarantee may be giving insufficient weight to those other values.

A second point is of particular relevance to U.S. readers. There is no general reason to think that U.S. constitutional law is at the “top” with respect to every specific constitutional guarantee. It may be there as to some guarantees but not as to others. As a result, the possibility that U.S. constitutional law will change as a result of the top-down and bottom-up pressures does not mean that in general U.S. constitutional law will get worse in some normative sense. My own sense is that these pressures will induce some changes in constitutional law. Some of those changes will seem reductions in the level of protection, for example perhaps with respect to the protection given commercial speech, and others will seem enhancements in the level of protection, for example perhaps with respect to the open acknowledgement that U.S. constitutional law properly understood guarantees some social and economic rights.<sup>52</sup> In both cases, though, the developments might as readily be characterized as movement toward the top as toward the bottom.

Third, radical critics of the Washington Consensus tend to believe that the consensus leads to a race to the bottom with respect to workers’ rights and environmental protection. That belief seems to me overstated

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<sup>52</sup> For discussions of the proposition that such rights are indeed already guaranteed by U.S. constitutional law properly understood, see Ernest Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007); CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004).

even when we consider only competition for investment capital, because of the effects of being at the bottom on social and political stability. Adding the pressures from competition for high-level human capital further weakens the claim that the race will end at the bottom. Subject to the possibility that geographical and cognitive separation of those with high-level human capital from those with less such capital will allow nations to deny human rights to those with lower levels of human capital, elite preferences for human rights exert pressure to push human rights guarantees upwards – though of course without any assurances about how much upwards.

Perhaps, though, the metaphor of “top” and “bottom” leads us to think in the wrong terms because it suggests that convergence will move everyone to a single point, whether at the top or the bottom. Instead, there might be multiple resting points. So, for example, we might see the emergence of *separate* “top down” networks of high court judges.<sup>53</sup> Cultural values to some but not all nations interested in attracting investment and high-level human capital may lead to *various* stable arrangements.

This seems a real possibility, but the argument may not undermine the argument that globalization of constitutional law is inevitable quite as much as it might seem. Perhaps human rights come in relatively large packages, with some but relatively small variations within the packages. I alluded to one version of this suggestion in discussing the possibility that constitutional law would converge on rights stated at an intermediate level of abstraction. It seems clear, for example, that a range of doctrines are compatible with fundamental principles of free expression, but that some doctrines are not.<sup>54</sup> If this suggestion is right, we might observe races to different points, but not to points widely separated on some relevant measure of human rights overall.

## VI. Conclusion: Globalization of Domestic Constitutional Law and the Separation of Powers

Most of the pressures I have described can be accommodated by any or all of a nation’s law-making institutions, and with respect to those

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<sup>53</sup> One can imagine, for example, a network of high-court judges from Moslem-majority nations operating with only occasional contacts with other judicial networks, or networks organized on a regional basis and, again, with relatively few contacts with other networks.

<sup>54</sup> A good candidate for one core principle is that governments may not criminally punish people merely because they criticize government policy, without making a reasonably strong showing that the criticism is likely to lead to serious social instability.

pressures separation of powers concerns are largely irrelevant.<sup>55</sup> The most prominent top-down pressures may be different in this respect, and indeed my sense is that most separation-of-powers concerns have indeed been expressed about judges influenced by transnational networks transforming domestic constitutional law “on their own,” so to speak, and about the implications for sovereignty of domestic constitutional responses to pressures from and decisions by transnational treaty bodies. At the formal level at least, I think that these concerns are misplaced.<sup>56</sup>

Rather, the concerns arise from an inchoate sense that convergence among national constitutions toward a common position is somehow problematic – that it undermines national sovereignty in some difficult-to-specify way. But, precisely because there is no good way to spell out precisely and in good legal form why the convergence is troublesome, application of ordinary domestic rules of constitutional interpretation will almost always – and perhaps will always – lead to the conclusion that the way in which globalization takes root in a nation’s constitution is consistent with the nation’s constitution.

In many ways the globalization of domestic constitutional law poses a problem for the separation of powers that resembles the problem posed by the rise of the administrative state and its modern successors. In the United States and Great Britain, the administrative state fit badly into the standard tripartite theory of separation of powers. James M. Landis finessed the problem by asserting that there was nothing magic about the number three.<sup>57</sup> And that turned out to be the solution in the United States and Great Britain.<sup>58</sup> Although occasionally questions about where

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<sup>55</sup> Put another way, to the extent that domestic constitutional law limits the paths by which constitutional change can be accomplished through, those pressures can exert themselves along the required pathways.

<sup>56</sup> Judges on domestic constitutional courts have the authority to make (and re-make) domestic constitutional law, and the separation-of-powers concerns one might have about their doing so by appropriating non-domestic law are no different from the separation-of-powers concerns associated with their power to make law generally. For a discussion, see Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOYOLA (LOS ANGELES) L. REV. 239 (2003). And decisions by transnational treaty bodies are either made applicable in domestic law by domestic processes, including whatever requirements domestic separation-of-powers rules impose, or induce domestic law-makers to make their own decisions, again in accordance with those rules.

<sup>57</sup> JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938), p. ---.

<sup>58</sup> Theorists of the administrative state attempted to rest its legitimacy on a new account of the separation of powers. They emphasized that all we really wanted from the separation of powers was a system in which

administrative agencies, quangoes, “Next Steps” organizations and the like fit into separation of powers theories crop up to bedevil constitutional theorists,<sup>59</sup> Landis’s solution seems to have stuck: However conceptualized, the modern administrative state must fit into our account of separation of powers because it is here to stay.

So too, I suspect, with the globalization of domestic constitutional law. Perhaps we will talk of the convergence process as one involving a “fifth branch” of government – Slaughter’s networks, for example. But once we are comfortable with the globalization of domestic constitutional law, the question of how we fit it into our separation of powers theories will become uninteresting. I end by saying that this is entirely understandable if, as I have sketched, the globalization of domestic constitutional law is inevitable.

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different institutions, with varying bases of legitimacy themselves, were in a position to check and balance each other, and that modern society had such institutions, both within the government and outside it in civil society.

<sup>59</sup> For a discussion of the imperfect fit between the British theory of ministerial responsibility and modern forms of administration, see PAUL CRAIG, *ADMINISTRATIVE LAW* (6<sup>th</sup> ed. 2008), ch. ---.